

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN RICHARD JAE,

CAPLIN & CO.

00-223

Plaintiff,

vs.

U.S. District Judge
Magistrate Judge Sny

FILED
HARRISBURG

MAY 31 2001

MARY E. D'ANDREA, CLERK
Per

DEPUTY CLERK

SUPERINTENDENT DRASZICH, et al.,

Defendants.

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS THE COMPLAINT AND BRIEF IN SUPPORT

I. COUNTER STATEMENT OF THE CASE

ON December 7, 2000, this Plaintiff commenced
this 42 U.S.C. § 1983 CIVIL RIGHTS ACTION by filing a complaint

on December 14, 2000, this Court granted the Plaintiff
leave to proceed in forma pauperis, herein this Court

On February 1, 2001, this Plaintiff filed an amended complaint.

On March 6, 2001, Defendants, by counsel, filed their Motion
To Dismiss the Complaint. Defendants' Brief In
Opposition To Dismiss was filed on March 20, 2001.

On April 5, 2001, the Plaintiff moved this Court for
an enlargement of time until May 20, 2001, in which to reply to
Defendants' Motion To Dismiss the Complaint. On April 16, 2001, the Court granted
the Plaintiff until May 29, 2001, in which to reply to Defendants' Motion To Dismiss.

Plaintiff now files his Brief in Opposition to Defendant's Motion To Dismiss The Complaint And Brief in Support here in this case, ~~and~~ please

II. COUNTER STATEMENT OF THE FACTS

The Complaint alleges that from September 12, 2000 until October 2, 2000, Defendant's officers Valente, Zimmerman, Taylor, Navak, New and Swift would open the windows in the RHV because of a fellow inmate talking too loud when it was cold outside, that a direct result of such Defendant's acts, actions & conduct, Plaintiff was really cold and uncomfortable and would shiver most of the day and night when he was awake during the referred to time period & such also put this Plaintiff at risk of catching pneumonia due to the cold air coming thru the open windows & placed this Plaintiff under imminent danger of serious physical injury, that the Defendants knew and were fully aware that the above actions & conduct caused this Plaintiff to become really cold, uncomfortable, as this Plaintiff told them such more than a dozen times, yet they did such & continued to do such deliberately & maliciously, showing deliberate indifference to this Plaintiff's physical health, safety & comfortableness & his rights not to be subjected to extreme temperatures; that Defendant Officer Valente told this Plaintiff several times during the above-time period because he doesn't like this Plaintiff, that this Plaintiff had to shiver as stated above due to the behavior of other inmates & that Defendant Dragovich was personally aware of the behavior of the other Defendants, but failed to correct & remedy such as he had the authority to do so, and that Defendant's had no legitimate reason(s) and/or need(s) to open the RHV windows during the above-stated time periods. The Amended Complaint alleges that, when Plaintiff complained to Defendant Superintendent

about the Acts, Actions & Conduct of Defendants Valentine, Zimmerman, Taylor, Navak, Ney & Swift, in opening & refusing to close the windows in the RHU, when it was really cold and Defendant Dragovich was the back to Plaintiff & he said

him the following:

"You have a lot of nerve complaining given your poor behavior and constant abuse of our staff. When you can start acting like a human being, we can talk. Right now your credibility is nil." (quote/ended)

It has, the above-reply letter to Plaintiff was dated September 2000, and that, the above-response of Defendant Superintendent Dragovich amounts to illegal retaliation for Plaintiff's behavior for Plaintiff had already been punished for by the Hearing Board which shows such Defendant's unwillingness to remedy the Acts, conduct of Defendants Valentine, Zimmerman, Taylor, Navak, Ney & Swift further shows Defendant Dragovich's unwillingness to follow & protect Plaintiff's rights & the Law under the Eighth Amendment of the United States

Constitution.

Furthermore, the Complaint herein this civil rights was filed on December 7, 2000, DC-ADM.#804 of July 20, 1994, is the Pa. Dept. of Corrections Administrative Directive which is applicable hereto this as the DC-ADM.#804 of January 1, 2001, that DC-ADM.#804 Administrative Directive of July 20, 1994 had no provision therein such directive stated that an inmate may appeal the rejection of a grievance by the Grievance Coordinator to the Superintendent. That this is the reason why this plaintiff did appeal the Grievance Coordinator's rejection on September 27, 2000, Grievance about the Defendant herein opening the RHU windows to Defendant Superintendent

Also, the new January 1, 2001, DC-ADM#804.VI.A.5.7 of 1994 Administrative Directive ~~and~~ DC-ADM#804.VI.C.2) only allow for an appeal to the Facility Manager (Superintendent) of the Review decision on the Grievance and does not provide for appeal of the rejection of grievance to the Superintendent.

Furthermore, the Grievance Coordinator violated ADM#804.VI.A.5.7 of 1994, when rejected this Plaintiff's Grievance of September 27, 2000, because, under DC-ADM#804.VI.A.5.7 of 1994, this Plaintiff was permitted to file a grievance based on different events, when it was necessary to combine the issues to support the claim, as in the case, herein, with this Plaintiff's September 27, 2000, Grievance, and that, the Plaintiff could not resubmit such September 27, 2000, Grievance, because, according to DC-ADM#804.VI.B.2, the grievance had to be submitted within 15 calendar days of the date of the incident being grieved and by the time this had submitted September 27, 2000, Grievance and he had received the rejection form letter back from the Grievance Coordinator, the 15 day filing period for such Grievance had already elapsed and it was thus too late to resubmit such Grievance there then. Furthermore, by improperly rejecting this Plaintiff's properly submitted September 27, 2000, ^{Grievance}, the Grievance Coordinator rendered the Administrative Review under DC-ADM#804 of July 20, 1994, unavailable.

Plaintiff

Furthermore, although this Plaintiff could not resubmit his improperly rejected September 27, 2000, Grievance, he had written & complained to Defendant Superintendent Dragovich & to Secretary of Correction Martin Hahn, on September 28, 2000, about the same incident.

for he has filed suit for herein this instant
 Defendants Dragovich, ~~Valentine~~, Zimmerman,
 Narkay and Swift are the Superintendent and on
 up at the State Correctional Institution At Camp Hill, which is where
 complaint arose from.

III. ARGUMENTS

A. 42 U.S.C. § 1997e(a), as AMENDED
 BY THE PLRA, IS UNCONSTITUTIONAL,
 AS IT IMPREMISSIBLY INFRINGES
 UPON AND VIOLATES THE DECISIONS OF
 THE UNITED STATES SUPREME COURT
 WHICH LIKE THE UNITED STATES
 CONSTITUTION ITSELF, IS THE
 SUPREME LAW OF THE LAND.

Plaintiff avers & submits that, 42 U.S.C. § 1997e(a), as Amended By the PLRA, IS Unconstitutional as it infringes upon and violates the decisions of the United States Supreme Court, which like the United States Constitution itself, is the Supreme Law of the Land. In particular, U.S.C. § 1997e(a), violates the U.S. Supreme Court decisions in *Fitzky v. Board of Regents of the State of Florida*, 457 U.S. 968, 102 S.Ct. 2557 (1982) and in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961) and their progeny which hold, State Prisoner does not have to exhaust his Prison Administrative Remedies before filing a 42 U.S.C. § 1983 Civil Rights Action in Federal Court & given that the U.S. Supreme Court decisions are, like the U.S. Constitution itself, the Supreme Law of the Land, Congress exceeded its legislative authority in enacting 42 U.S.C. § 1997e(a), which is unconstitutional null & void. 5

B. 42 U.S.C. § 1983(a), AS AMENDED BY THE PLRA, IS UNCONSTITUTIONAL AS IT IMPREMISSIBLY SINGLES OUT AND TREATS PRISONERS DIFFERENTLY THAN OTHERS AND THUS DENIES PRISONERS EQUAL PROTECTION / TREATMENT OF THE LAW UNDER THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

Plaintiff Jare avers & argues that, 42 U.S.C. § 1983(a), AS AMENDED BY THE PLRA, IS UNCONSTITUTIONAL AS IT IMPREMISSIBLY SINGLES OUT AND TREATS PRISONERS DIFFERENTLY THAN OTHERS AND THUS DENIES PRISONERS EQUAL PROTECTION / TREATMENT OF THE LAW UNDER THE FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION, such does "not" require non-prisoners to exhaust available administrative remedies before suit under 42 U.S.C. § 1983, but requires prisoners to do so and prisoners have the same rights as non-prisoners have & therefore, 42 U.S.C. § 1983(a) is unfair, unjust, discriminatory & unconstitutional & IS NULL & VOID.

C. PLAINTIFFS 42 U.S.C. § 1983 CIVIL RIGHTS COMPLAINT, HEREIN THIS CASE, SHOULD "NOT" BE DISMISSED FOR PLAINTIFF'S FAILURE TO EXHAUST HIS AVAILABLE ADMINISTRATIVE REMEDIES, HEREIN.

Defendants first claim, that:

- If a grievance is determined to be improper submitted it is returned to the inmate with a form setting forth the reason for rejection DC-ADM 804 SLT-B-1-d. The inmate may appeal.

the rejection of his grievance to the
superintendent, DC-ADM #804. ^{VI.C.} he
may resubmit the grievance, DC-ADM #804.
B-1-d.

However, the Plaintiff, by reply to such, argues
that, first of all, this civil action was filed
December 7, 2000, with this court, and thus, DC-
#804 of July 20, 1994, ^{is} the Pennsylvania Department
Corrections Administrative Grievance Directive
which is applicable hereto to this case, not
DC-ADM. #804 Administrative Grievance Directive
which the Defendants have attached thereto to
Brief In Support of Defendants' Motion to Dismiss
herein this instant case, as the DC-ADM. #804
which the Defendants attach to their Brief, he
was "not" even in effect yet at the time/dan
which this Plaintiff commenced this action in
Court, as such DC-ADM. #804, did "not" even come in
effect until January 1, 2001, and thus, Defendants
may "not" rest their base their arguments/claim
upon this DC-ADM. #804, of January 1, 2001,
new law may only be applied to conduct occurring
after date of its enactment, ^{USK} ~~Capra~~, 981 F.2d
(11th Cir. 1993) and Henderson v. Lane, 979 F.2d
(7th Cir. 1992) (In deciding whether right was "clearly
established" for civil rights immunity purposes, Court
should focus on state of law at time of alleged violation
and that the DC-ADM. #804, Administrative Grievance

1/ See Defendants' Brief In Support of Motion to Dismiss, at

2/ This is the same DC-ADM. #804 which Defendants take from

3/ See page -1- of the DC-ADM. #804, attached to Defendants
In Support of Motion to Dismiss 7

Of July 20, 1994, had no provision therein such as a directive stating that an inmate may appeal the rejection of a grievance by the Grievance Coordinator to the Superintendent and that this is the reason why Plaintiff did not appeal the grievance coordinator's rejection of his September 27, 2000, Grievance about the Defendant Superintendant opening the RHU windows to Defendant Superintendant Dugovich. Also, the new January 12, 2001, DC-ADM # VI-C, Administrative Grievance Directive (the new DC-ADM # 804, attached to Defendants' Briefs hereto), provides for an appeal to the Facility Manager (Superintendent) of the initial review decision on the grievance and does not provide for an appeal of the rejection of a grievance to the Superintendent, as the Defendant is and claim it does and Plaintiff challenges.

Defendants to show where in DC-ADM # 804, VI-C, it specifically states in writing that an inmate may appeal the rejection of a grievance by the Grievance Coordinator to the Facility Manager (Superintendent) and second, this Plaintiff could not resubmit such September 27, 2000, Grievance, because, according to DC-ADM # 804, R-7 of July 20, 1994, the grievance had to be submitted within 15 calendar days of the date of the incident being grieved and by the time this Plaintiff had submitted the September 27, 2000, Grievance and he had actually received the form letter form back from the SCI-Camp Hill Grievance Coordinator, the 15 day filing period for such Grievance had already elapsed and it was thus too late to resubmit such Grievance there then.

Defendants next claim, that =
 Jae claims in his complaint that he filed
 a grievance on September 27, 2000, and that
 the grievance coordinator rejected it. The
 complaint contains no allegations that Jae
 attempted to obtain review of this decision
 by appealing it to the superintendent
 that Jae resubmitted his grievance as
 provided by the grievance policy. 4/

In response to the above, this Plaintiff aver-
 submits that such is true, however, by way of
 response to such, this Plaintiff avers that
 that, he did not appeal the rejection of his
 27, 2000, grievance to the Superintendent &
 resubmit such grievance as provided by the
 grievance policy, was "illegal" because of the
 same reasons as is set forth here in this Brief,
 at 8.

Lastly, Defendants claim & argue that =
 Here, Jae has not demonstrated that he has
 exhausted all available administrative
 remedies. Although he alleges that he
 submitted a grievance, which was rejected,
 he does not demonstrate that he took
 available steps to correct the problem, either
 by appealing the grievance coordinator's
 decision or resubmitting a revised grievance.
 Jae's failure to exhaust all available administrative
 remedies required by § 1997(e) of the PLRA bars his
 action. Accordingly, the complaint should be dismissed.

However, by way of reply to the above, this Plaintiff avers
 4/ See Defendants' Brief In Support of Motion to Dismiss
 5/ See Id. at 4.

argues that, contrary to what the Defendants' ~~he~~ claim there was no available steps to correct the problem based upon what he stated & argued, ~~herein~~ ^{supra}. Furthermore, this Plaintiff responds & ~~aver~~ ^{averts} that, the Grievance Coordinator violated DC-ADM. #804.VI.A.5, of July 20, 1994, when he rejected the Plaintiff's Grievance of September 27, 2000, under DC-ADM. #804.VI.A.5, of July 20, 1994, this was permitted to file a grievance based on different events, when it was necessary to combine the events to support the claim, as was the case, ~~herein~~ ^{supra}, with this plaintiff's September 27, 2000, Grievance. Furthermore, by implicitly rejecting this plaintiff's properly submitted September 2000, Grievance, the Grievance Coordinator rendered administrative remedies under DC-ADM. #804.VI.A.5, of July 20, 1994, unavailable to this inmate-plaintiff and he could not exhaust such. Plaintiff only has to exhaust the prison's administrative remedies which are available to him. See *Camp Brennan*, 219 F.3d 279 (3d Cir. 2000), and there are no "available" remedies ~~herein~~ ^{supra} for him to exhaust as when he attempted to comply with and ~~his~~ ^{the} available administrative remedies under DC-ADM. #804.VI.A.5, of July 20, 1994, ~~at the SCI-Camp Hill Grievance Coordinator~~ ^{by the Grievance Coordinator} illegally violated DC-ADM. #804.VI.A.5, of July 20, 1994, to allow this plaintiff to do so, thereby rendering administrative remedies under DC-ADM. #804.VI.A.5, of July 20, 1994, unavailable to this plaintiff, the no fault of the plaintiff, that there was no provision under DC-ADM. #804.VI.A.5, of July 20, 1994, allowing for this plaintiff to appeal the grievance.

rejection of the grievance of September 27, 2000 to the Superintendent, and it was too late to resubmit such grievance, as by the time that he had subjected such grievance & had ~~actually~~ received the Grievance Coordinator's Form Rejection, the 15 day allowable time period to file a grievance in had already expired/elapsed.

Furthermore, although this Plaintiff could not file a grievance, he had written & complained to Defendant Superintendent Dragovich & the Secretary of Corrections, Harry, on September 28, 2000, about the same incident for which he has filed suit for herein this instant and thus he "has" presented the incident and facts surrounding such in the complaint, herein case, to prison officials. (Defendant Superintendent Dragovich and also to the Secretary of Corrections, the Pennsylvania Department of Corrections) & he "has" given these prison officials the opportunity to address & correct the problem/violations complained about in the complaint, herein case, that they would have had if he had been able to file a grievance and exhaust his administrative remedies as to such violation DC-ADM #804, & thus, he has "not" failed to exhaust his administrative remedies, herein. If he is deemed by this Court to have failed to exhaust such available administrative remedies herein, then he "has" shown excusable reason that such and such remedies "were" rendered unavailable.

to him thru no fault of his own and due to circumstances which were beyond his control, as described herein, *supra*, at 7-9, and, thus, he should not be unfairly & unjustly penalized by having his complaint and this case dismissed for failure to exhaust administrative remedies under DC-ADM #804, *FOIA*, 20, and 42 U.S.C. § 1997e(a) should not be deemed & held to bar this instant civil rights Act.

D. THIS COURT SHOULD NOT DISMISS THIS ACTION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES UNDER DC-ADM #804 AS THE PLAINTIFF CANNOT NOW EXHAUST SUCH REMEDIES AS SUCH ARE NO LONGER AVAILABLE TO HIM NOW.

Although he maybe wrong, this Plaintiff believes & therefore avers & submits to this Court grants the Defendants' Motion to Dismiss this Plaintiff's complaint, herein to case, such dismissal is without prejudice. This Plaintiff could refile the complaint as he had exhausted his administrative remedies under DC-ADM #804, ^{in full} however, because this Plaintiff now as no remedies available under DC-ADM #804, due to the facts that it is way beyond the allowable 15 days time to file such grievance, he would be barred from exhausting his administrative remedies under

DC-ADM #804-7 and because he is now no longer up at S CI - Camp Hill, it would be futile for this court to dismiss Complaint for failure to exhaust administrative remedies, without prejudice, and order the plaintiff to go back & exhaust his administrative remedies and then his complaint once he has exhausted it fully, as this Plaintiff could "not" do as he has no administrative remedies available to exhaust under DC-ADM #804.

For the foregoing facts, arguments & Citations of Authorities, Defendant's Motion to Dismiss the Complaint, must, as a matter of law, for fairness and judicial economy, be dismissed without prejudice, by the court, here in this Instant Civil Rights Action forthwith:

RESPECTFULLY SUBMITTED

(S) John Richard Jacobs
 MR. JOHN RICHARD JACOBS
 #BX-3219
 SCI-Greene/PMU
 175 Progress Drive
 Waynesburg, PA 15370

Dated: 24th MAY 2001=

Plaintiff and Researcher

DC-804
PART 1COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF CORRECTIONS
P.O. BOX 598
CAMP HILL, PA. 17001-0598

OFFICIAL INMATE GRIEVANCE

GRIEVANCE NO.

TO: GRIEVANCE COORDINATOR <u>MR. Ben C. Livingston</u>	INSTITUTION <u>SCIC</u>	DATE <u>9/27/00</u>
FROM: (Commitment Name & Number) <u>MR. John R. Doe, #B2-3219</u>	INMATE'S SIGNATURE <u>(S) John R. Doe</u>	
WORK ASSIGNMENT <u>None</u>	QUARTERS ASSIGNMENT <u>RHU - B106 Cell</u>	

INSTRUCTIONS:

1. Refer to the inmate handbook Page 12 and DC-ADM 804 for information on the inmate grievance system.
2. State your grievance in Block A in a brief and understandable manner.
3. Next, you are required to list in Block B the specific actions you have taken to resolve this matter. Be sure to include the identity of staff members you have contacted. I request a personal interview.

A. Brief, clear statement of grievance:

My grievance is lodged against the RHU Lt. Rhoades & Rutherford & the RHU officers, in all three shifts. Once again, they are violating my 1st, 8th & 14th Amendment Constitutional Rights as follows: on 9/20/00, a-10 refused to put my outgoing mail & opened & read such mail & then returned it to me. On 9/22/00, RHU Lt. Rutherford illegal ly took my Gbbs confiscated. This also violates DC-ADM #803-VI. Also, the officers start off a delay in getting my incoming mail. E-a-f-v. Also, for the past weeks since around 9/30/00, RHU officers have been opening the windows in the RHU where RHU inmates get noisy & it is cold out & I have to suffer the violation of the 14th Amendment. Also, on 9/23/00, I was illegally taken to the library book here to be cause other inmates were making noise. The first half of all items to be burnt for library books & I'm quiet. On 9/24/00, RHU Lt. Rhoades illegally denied me Equal Protection of the law by denying me a clean jump suit & towel & bed linen & pillow & other RHU stuff. On 9/24/00, he threatened to assault me. My grievance is filed.

B. Actions taken and staff you have contacted before submitting this grievance:

I tried to informally resolve the above matters by attempting verbally discuss such with RHU Lt. Rutherford on 9/22/00, RHU Lt. Rhoades on 9/24/00, but to no avail & on 9/23/00 & 9/24/00, I discussed these matters with RHU Lt. Lady on 9/26/00, attempted to see Mr. Spink about such, but he left the block without seeing me.

Your grievance has been received and will be processed in accordance with DC-ADM 804.

Signature of Grievance Coordinator

Date

Plaintiff's Exhibit - A -

SCZ camp H/1

SEP 26 2000

DC Number BQ 3219	Name Joe, John R. (RHU/B06-Cell)	Institution Referred SCZ
----------------------	-------------------------------------	--------------------------------

Superintendent Dragovich, Sir Placeret
 I am getting sick & tired of getting
 by your officers for things I have a right to. I
 library book to read and being made to suffer
 by your officers opening up & refusing to close them
 in the RHU because of a few ass hole niggers
 want to run their con mouths & sit up there
 say nothing and yet I am illegally denied a library
 because your officers burn the whole entire front
 of the RHU for their library books on Saturday, September
 2000, because they heard a few nigger inmates in
 B103, B104, B107 & B108 talking to loud and your
 for the same reason I will open up all the windows
 on RHU B107 when it is really cold outside as it has
 the last several days & leave such open, and
 I see this you can order the RHU officers here
 touch the RHU windows unless an RHU inmate
 them to open & close the windows directly in front
 cell & then they must do so, or in the alternative I
 sue your RHU officers for \$25,000.00 compensa-
 \$25,000.00 Punitive Damages in court for cruel/
 unusual punishment and deliberate indifference to my
 well being/health and also sue you, Sir
 conspiracy along with your officers. Also on 9/21
 at my 30-day PRC Review where Deputy Superintendent
 ordered that I be given my legal materials
 on a slip paper that I gave to them here then on the
 same date, however, RHU Property Officer Rub
 has deliberately & maliciously failed to comply with
 Palatovich's orders and give me such legal materials
 here & on Thursday, September 21, 2000 he
 & brought that loud-mouthed nigger in B104 Cell
 his legal materials because he said he had court plea
 due on 9/29/00, and I had court pleadings due on 9/29
 And on 9/29/00 RHU Lt. Rhoades deliberately & maliciously
 given me a RHU jump suit & a towel & a blanket & all
 inmates as such things are such exchange is mandatory

PLAINTIFF'S EXHIBIT - (S) 2/1/00 210

CERTIFICATE OF SERVICE

I certify ~~that~~ on 5-25-01, I mailed to the person or
below a true & correct carbon copy of the Plaintiff's Brief in App
to Defendant's Motion to Dismiss the Complaint And Brief
Support, by U.S. 1st Class Mail, Postage Prepaid & addressed to

MR. MICHAEL L. HARVEY, SDAG,
Office of the Attorney General of Pennsylvania
1st Floor - Strawberry Square
Harrisburg, PA. 17120

I certify that on 5-25-01, I gave the original of the above
document to prison officials here for mailing to this court.

I certify under penalty of perjury & pursuant to 28 USC 1746
above, is true & correct.

Dated/Executed on:
25th MAY 2001:
At: Waynesburg, Pennsylvania:

(S) John Richard
MR. JOHN RICHARD
#BQ-219
Sgt - Greene/SMU
175 Fagness Dr The
Waynesburg, PA 153
Harrisburg and Pa Se